

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL O'LEARY,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF FLINT, a/k/a FLINT
TOWNSHIP, and DOUGLAS CARLTON,

Defendants-Appellees.

UNPUBLISHED

April 12, 2011

No. 295078

Genesee Circuit Court

LC No. 08-089485-CL

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

In this action claiming retaliation for a protected activity under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, plaintiff appeals as of right from the trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We affirm.

Plaintiff is a building inspector for defendant Flint Township. Plaintiff alleged that he was retaliated against and disciplined by defendant Douglas Carlton after his refusal to shut down an establishment called the Beach House. A liquor license transfer was pending because of the sale of the business to new owners that included at least one African-American. Plaintiff asserted that businesses were allowed to continue to operate despite multiple code violations. However, defendant Carlton denied that any action taken against the establishment was based on race. Rather, it was countered by defendant's employees that the primary concern was liability because of criminal activity, including a shooting at the premises, an inadequate sprinkler system, and complaints by neighbors of improper activity after closing time. Plaintiff ultimately

¹ After plaintiff initiated this appeal, he moved for, and was granted, permission by this Court to file a second amended complaint with the trial court asserting a claim for violation of the Whistleblowers' Protection Act, MCL 15.361 *et seq.* The merits of that claim are not before us at this time, but the claim will need to be addressed by the trial court at the conclusion of this appeal.

shut down the Beach House at the direction of the Genesee County Health Department on September 12, 2007, due to a lack of hot water, and no utility supplies of gas or electricity.

After the Beach House incident, plaintiff was suspended on three occasions for disposing of live ammunition in a township wastebasket, for failing to follow up on a code violation, and for throwing away operational township property. Additionally, three other discipline memos were placed in plaintiff's file. However, plaintiff received a new supervisor, and she did not take action on the memos that cited activity prior to her start date.

Plaintiff claims these discipline actions were in retaliation for his purported refusal to shut down the Beach House on May 16 and 18, 2007. Plaintiff filed this ELCRA action claiming the discipline actions were in retaliation for a protected activity. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), finding that the suspensions were too attenuated from the purported protected activity.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007); *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown*, 478 Mich at 551-552. A grant of summary disposition is appropriate if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Brown*, 478 Mich at 552; *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

Plaintiff first argues the trial court erred by finding a lack of causation between the purported protected activity (refusal to follow race based order to shut down Beach House) and the alleged retaliatory and adverse employment actions.

The ELCRA provides in pertinent part:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701(a).]

Retaliation under the ELCRA may be established through either direct evidence or by establishing a prima facie case of retaliation. We first note that plaintiff's claim of direct evidence of retaliation is without merit. "Direct evidence is evidence that proves the existence of a fact without requiring any inferences." *Rowan v Lockheed Martin Energy Sys, Inc*, 360 F3d 544, 548 (CA 6, 2004). Plaintiff's reliance on *DeBrow v Century 21 Great Lakes, Inc (After Rem)*, 463 Mich 534; 620 NW2d 836 (2001), is misplaced. The Court therein found direct evidence of age discrimination where an employer stated the employee was "too old" when

terminating his employment. Unlike *DeBrow*, 463 Mich at 538-539, the only supporting evidence presented in this case was that defendant Carlton stated he did not want “Gang Bangers” or “North Enders” in Flint Township. We decline to conclude or infer that such words are per se race-based.² Moreover, discriminatory words directed at African-Americans were not used and not alleged in plaintiff’s complaint. Accordingly, this is not a direct evidence case as claimed by plaintiff.

To establish a prima facie case of retaliation under the ELCRA, a plaintiff must demonstrate:

“(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Michigan courts are guided by federal court interpretations of the counterpart federal statute when interpreting provisions of the ELCRA. *Chambers v Tretco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000); *Barrett v Kirtland Community College*, 245 Mich App 306, 314, 628 NW2d 63 (2001). Federal precedent based on title VII, if analogous to questions presented under the ELCRA, are persuasive and are afforded substantial consideration by this Court. *Barrett*, 245 Mich App at 315; *DeFlaviis*, 223 Mich App at 437. However, this Court will not defer to federal interpretations when doing so would be inconsistent with any portion of our Legislature’s enactment. *Barrett*, 245 Mich App at 314-315.

A “[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action” to establish causation in a retaliatory discrimination case. *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). An adverse employment action must (1) be materially adverse, more than “mere inconvenience or an alteration of job responsibilities,” and (2) have an objective basis for demonstrating that the change is adverse. *Meyer v City of Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000), citing *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999).

“To establish causation, the plaintiff must show that his participation in activity protected by the [ELCRA] was a ‘significant factor’ in the employer’s adverse employment action, not just that there was a causal link between the two.” *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004), quoting *Barrett*, 245 Mich App at 315. See also *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986). A plaintiff may establish a causal connection through circumstantial evidence, such as close temporal proximity between the protected activity

² We note that defendant Carlton testified that he was referencing gang names and that criminal activity including a shooting had occurred at the Beach House. Plaintiff did not present any evidence to contradict this testimony.

and adverse actions. The circumstantial evidence must enable a reasonable fact finder to infer that an action had a retaliatory basis. *Town v Michigan Bell Tel Co*, 455 Mich 688, 697; 568 NW2d 64 (1997) (Opinion by Brickley, J.); *Rymal*, 262 Mich App at 303.

Contrary to plaintiff's argument, there is no evidence to support a finding that his refusal to shut down the Beach House for the alleged racial reasons was a "significant factor" in the subsequent disciplinary actions. First, plaintiff was never disciplined directly for his job performance on the Beach House inspections. Second, there is no close temporal proximity between the purported refusal and the initial discipline on August 2, 2007 (ammunition in the wastebasket). Further, defendant Carlton's statements to plaintiff to "just do his job" and that he did not do a "good job" on the Beach House are simply insufficient to demonstrate that the discipline action in August, 2007, had a retaliatory basis. Further, while plaintiff disagrees with the punishment imposed in August 2007, he admits placing the live ammunition in the wastebasket. Finally, the other two discipline actions occurred six months (November 13, 2007—failure to follow up on code violations) and fifteen months (August 8, 2008—township camera in trash can) after the Beach House inspection. A significant lapse in time, such as those in this case, are insufficient to establish causation under the ELCRA, especially given plaintiff's earlier discipline issues. See *Cox v EDS Corp*, 751 F Supp 680, 695 (ED Mich 1990) (lapse of nearly two months between the time that the plaintiff filed a racial discrimination complaint and her date of discharge, in addition to fact that the plaintiff's performance problems occurred before and after the complaint was filed, weighs heavily against finding of pretext without any direct evidence of racial discrimination).

Plaintiff also claims the disciplinary actions were a pretext for retaliation following the Beach House liquor license transfer inspections, and that such pretext establishes the requisite causation element of a retaliatory action claim under the ELCRA. To overcome the business reasons set forth by defendants for the subsequent disciplinary actions, plaintiff must demonstrate by a preponderance of the evidence that those reasons were a pretext designed to mask retaliation for plaintiff's work on the Beach House. *Imwalle v Reliance Med Prods*, 515 F3d 531, 544 (CA 6, 2008). Plaintiff was never directly disciplined for failing to shut down the Beach House as originally directed by defendant Carlton. Plaintiff admitted that he placed the live ammunition in the wastebasket, and did not deny that he failed to re-inspect the garbage cans at the Riverwood Development to confirm they had wire over them. Plaintiff did deny the camera was still working when he disposed of it, and there was conflicting evidence regarding whether or not it worked, was fixed by defendant Carlton, or just needed new batteries. While the punishments appear somewhat excessive given the behavior involved, plaintiff's employment record contains prior memos of discipline by-then supervisor, Galen Jamison, including one from mid-May 2007 in which he was warned that any future discipline may include suspension for a period of time without pay. Plaintiff's challenge to defendants' discipline actions are conclusory at best and fail to point to any specific basis for establishing pretext, let alone tying them in any way to his purported refusal to shut down the Beach House. See *Wixson v Dowagiac Nursing Home*, 87 F3d 164, 171 (CA 6, 1996) (the plaintiffs did not deny that incidents leading to discharge occurred. Allegations of past problematic relationships with their employer, without more, would not allow a trier of fact to conclude the reasons given for discharge were pretextual). Thus, plaintiff failed to present evidence from which a reasonable finder of fact could conclude the discipline actions were pretextual.

Accordingly, the trial court correctly determined that the connection between the alleged protected activity and the subsequent discipline actions is too attenuated to establish a prima facie case of retaliation under the ELCRA. Plaintiff failed to demonstrate a causal connection between the purported protected activity and the disciplinary actions. *Garg*, 472 Mich at 273; *Town*, 455 Mich at 697; *Rymal*, 262 Mich App at 303.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood